Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Notice of Inquiry:
Framework for Broadband Internet Service GN Docket No. 10-127

TO: THE COMMISSION:

Comment of National Religious Broadcasters in Response to Notice of Inquiry – A Legal Framework For Commission Jurisdiction Over Broadband Internet Service

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SUMMARY AND INTRODUCTION

National Religious Broadcasters (NRB) is a non-profit association that exists to keep the doors of electronic, broadcast, and digital media open and accessible for the Christian Gospel. Our members, most of whom are radio and television broadcasters that produce and/or telecast faith-based programming, reach millions of Americans daily. In addition, we draw our membership from other entities, including Christian book publishing companies, film, video and television production companies, public relations agencies, legal organizations and law firms, charitable relief organizations, churches with media outreach programs, and public policy organizations. All of them utilize the Internet as a valuable and integral part of their communications outreach, which includes the use of websites, web-streaming, blogs, social networking sites, email, electronic delivery of images, and transmission of audio and video files and other broadcasting content.

While this Notice of Inquiry (hereinafter "NOI") pertains primarily to a legal issue, namely, the jurisdictional basis for the Commission's intended regulation of some aspects of Internet broadband service, there are also wide-ranging policy implications that will result, depending on how the Commission decides to classify those aspects of Internet service.

It is our considered judgment, as discussed below, that the Commission ought to pursue a narrow path of "ancillary jurisdiction" under Title I, rather than a broad jurisdictional avenue under Title II. This is advisable for several reasons.

First, "ancillary jurisdiction" pursuant to Title I of the Communications Act is available for narrow, limited regulatory oversight of Internet service. This is made clear by the decision of the United States Supreme Court in the *Brand X* case.

Second, Title II of the Communications Act is an inappropriate basis for jurisdiction. While the Commission has implied in this NOI a search for broad, generous jurisdiction over broadband Internet service, the stated and intended focus, that of "*broadband communication networks*" is inapposite to the concept of "telecommunications" service, which lies at the heart of Title II.

Third, the *Comcast* court decision would permit the assertion of "ancillary jurisdiction" where a policy statement is coupled with an express delegation of authority from Congress. However, this would not permit the kind of broad authority that the Commission seeks regarding the supervision of Internet network management decisions. For that, the Commission must await new statutory authority from Congress. However, it would, as an example, authorize the Commission to insure that no Internet service provider or other "gatekeeper" blocks the web communications of a consumer because of disagreement with the religious content or viewpoint expressed. This protection of otherwise lawful communications over the Internet from viewpoint censorship strikes us as a paramount priority; unfortunately, the Commission has shown little interest in exploring a framework to protect this basic communications freedom.

Fourth and finally, the Commission's purported shift to a Title II jurisdictional basis as a "framework" for regulations concerning broadband Internet service would constitute a "change of policy" which would require a "reasoned analysis" to justify it. We fail to see in the record thus far any basis to support such a "reasoned analysis."

I. DISCUSSION

A. Ancillary Jurisdiction Under Title I Provides an Adequate Basis For Jurisdiction of the Commission Concerning Internet Service

In this Notice of Inquiry, the Commission asks whether ancillary jurisdiction under Title I of the Communications Act provides an adequate basis for jurisdiction of the Commission concerning Internet service. NOI, ¶¶ 30-31. We believe that it does.

As the Commission points out:

> In *Brand X*, the Supreme Court appeared to confirm this widely held view, stating that "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction." Id., citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 996 (2005)(hereinafter, "Brand X").

The Court in *Brand X* described the relationship between "telecommunications" classification and "information service" under the Communications Act of 1996, this way:

> The definitions of the terms "telecommunications service" and "information service" established by the 1996 Act are similar to the Computer II basic- and enhanced-service classifications. "Telecommunications service"—the analog to basic service—is "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." 47 U. S. C. § 153(46). "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form or content of the information as sent and received.*" § 153(43). "Telecommunications carrier[s]"—those subjected to mandatory Title II common-carrier regulation—are defined as "provider[s] of telecommunications services." § 153(44). And "information service"—the analog to *enhanced service*—is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications ...." § 153(20). 545 U.S. at 977 (emphasis added).

Though "telecommunications" (the "transparent" transmission over the wires of the consumer's message without enhancement, conversion, etc.) and "information service" (the conversion of information to usable formats over the Internet, the accessing

of various Internet information platforms, etc.) are "functionally integrated" (*Brand X* at 991), according to the Supreme Court, that did not render unreasonable the Commission's determination that information service trumped the issue so as to provide a Title I ancillary jurisdictional classification.

In other words, the Commission has, and may continue to treat "information service" over the Internet as the primary classifying factor for jurisdictional purposes when it is functionally integrated also with telecommunications transmission. In addition, we believe that Title I ancillary jurisdiction also provides a narrow scope of jurisdiction of the Commission over Internet "information service" when they are offered separate from a "telecommunications" service, as long as it is an "offering of a *capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications ..." 47 U.S.C. § 153(20). (emphasis added). *Brand X*, 545 U.S. at 977. Internet Service Providers (ISP's) sell Internet "capability" for the various functionalities over the web, but need not actually provide the telecommunications transmission itself. In either situation, the Commission has, at least in the abstract, an ancillary jurisdictional basis to provide a very narrow range of regulatory measures regarding the Internet.

B. Title II is an Inappropriate Jurisdictional Basis

It seems clear that the Commission desires to seek refuge under Title II of the Communications Act (see NOI ¶ 28) in response to the *Comcast* case, a decision we discuss in Section C below. But it is also clear that the jurisdiction that the Commission would like to exert is broad and far-reaching: It seeks a framework that will enable it to "promote[ ] investment and innovation in, and protect [ ] consumers of, broadband

Internet service ..." ¶ 1; "We emphasize that the purpose of this proceeding is to ensure that the Commission can act within the scope of its delegated authority to implement Congress's directives with regard to the broadband communications networks used for Internet access. These networks are within the Commission's subject-matter jurisdiction over communication by wire and radio and historically have been supervised by the Commission," ¶ 10; " ...the Commission must retain its focus on implementing broadband policies that encourage investment, innovation, and competition, and promote the interests of consumers." ¶ 25.

The Commission's plan is to assert its broad Title II jurisdiction, but then to forebear large portions of its authority thereunder. ¶ 28. That approach strikes us a little like a chef endorsing an entire cookbook while at the same time declaring that he would reject almost all of the recipes.

Moreover, Title II jurisdiction is clearly unavailable for the Commission's planned uses regarding the Internet, as "telecommunications" service is really not the focus of the Commission's intended exercise of jurisdiction; the focus here, as the Commission has stated, is "broadband communications *networks* used for Internet access ..." ¶ 10. Decisions impacting the management of Internet *networks* are not "telecommunications" related (having to do with pure transmission over wires), but rather, are "information" related (having to do with capabilities of accessing, storing, and generating content over the Internet through the use of networks).

C. The Impact of the Comcast Case

This brings us to the impact of the decision of the court in *Comcast v. FCC*, 600 F. 3d 642 (DC Cir. 2010). The Commission solicits comments on the effect of that

decision. ¶ 31. The *Comcast* case stands for the proposition that "policy" pronouncements by Congress are not sufficient alone to anchor ancillary jurisdiction under Title I of the Communications Act. However, as that Court noted, such policy statements, if ancillary and therefore related to delegations of regulatory authority elsewhere, can provide a jurisdictional basis under Title I.

With the exception of only one section cited, we doubt that any of the proposed delegations of authority from Congress mentioned in this NOI (see ¶¶ 32-51) would provide a sufficient, relevant anchor when coupled with the Internet policy pronouncements of Congress, to grant the Commission the kind of far-reaching jurisdiction it intends to exert over Internet network management decisions under Title I. If the Commission desires this kind of authority, then it must be up to Congress to *expressly grant it.*

What authority has Congress delegated to the Commission, as described in this NOI, that might serve as a regulatory anchor? Only one by our measurement, and it would provide only a very *narrow* regulatory scope for the Commission. In ¶ 45 of this NOI it is pointed out that:

> Section 202(a) of the Communications Act makes it unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

In addition, Congress has stated a non-discrimination policy in section 1 of Title I, 47 U.S.C. §151, where it indicates that the purpose of the Act is for "regulating interstate and foreign commerce in communication by wire . . . so as to make available . . . to all

the people of the United States, without discrimination on the basis of race, color, religion ..."

Thus, it could be said that prohibiting discrimination relating to "information service" over the Internet on the *basis of religion* under section 1 of Title I is ancillary to the authority under section 202 to enforce nondiscrimination regarding "practices" impacting "communication by wire ..."

This is obviously a very confined, narrow source of jurisdiction. However, it is one that National Religious Broadcasters has urged previously in another proceeding; we have argued that the Commission should focus on the confined area of preventing viewpoint-based censorship over the Internet.[1] We are particularly concerned about the future potential for blocking, or restricting religious content from access to the Internet.

As for the Commission's much broader Internet agenda however, we suggest that the only solution for that would lay in a new, explicit grant of authority from Congress, one that is conspicuously absent at present.

D. Assertion of Title II Jurisdiction would Constitute a "Policy Change"

Several Commissioners have indicated a strong predilection for a "Third Way," i.e., changing the Commission's asserted basis for Internet service regulation from an ancillary jurisdiction framework under Title I, to jurisdiction under Title II coupled with forbearance.[2] We would contend that this is not merely a technical legal question. This

[1] Comments of National Religious Broadcasters Regarding Notice of Proposed Rulemaking on Preserving the Open Internet, January 13, 2010, pages 11-14, In the Matter of Preserving the Open Internet – Broadband Industry Practices, GN Docket 09-191, WC Docket No. 07-52.

[2] Statement by Chairman Genachowski, "The Third Way: A Narrowly Tailored Broadband Framework," May 6, 2010; Statement of Commissioner Mignon Clyburn Regarding Chairman Genachowski's Announcement to Reclassify Broadband, May 6,

Notice of Inquiry posits a "Third Way" as a means to achieve certain broad policy goals. "In this Notice, we seek comment on the *best way for the Commission to fulfill its statutory mission with respect to broadband Internet service* in light of the legal and factual circumstances that exist today." NOI, ¶ 9 (emphasis added).

The Commission bears the burden of justifying a change of policy. "The Commission may, of course, change its mind, but it must explain why it is reasonable to do so." *Fox Television Stations, Inc., v. F.C.C.*, 280 F.3d 1027, 1044-45 (D.C. Cir. 2002) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 103 (1983)(" ...an agency changing its course must supply a reasoned analysis").

Once the Commission has "chang[ed] its course" (*Motor Vehicle Mfrs. Ass'n, supra)* it must provide a reasoned basis for that reversal of policy. Regarding that point, the justification given by the Commission in this NOI for this policy change is the adverse decision of the Court of Appeals in *Comcast*. "*Comcast* makes unavoidable the question whether the Commission's current legal approach is adequate to implement Congress's directives." NOI, ¶ 9.

We would contend however that this is not a "reasoned analysis" for the Commission's change of position. Merely because the Court of Appeals in *Comcast* held that the approach of the Commission in that particular case exceeded the reach of ancillary jurisdiction, does not render "reasonable" the attempt to over-reach yet again, this time using an assertion of ill-fitted jurisdiction under Title II. The "Third Way" policy contained in this NOI would in effect constitute a "new way," which is

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2010; Statement of Commissioner Michael Copps Regarding Chairman Genachowski's Announcement to Reclassify Broadband, May 6, 2010.

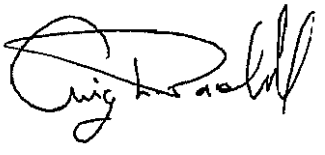
inconsistent with the previous policy of Title I ancillary jurisdiction. As such, because the Commission's new policy would be "contrary to its precedent," a "reasoned analysis" is a precondition. *Verizon Telephone Companies v. F.C.C.*, 570 F. 3d 294, 304 (D.C. Cir. 2009). We do not see any basis in the record thus far that would justify any "reasoned analysis" for this change.

II. CONCLUSION

It is our considered judgment that the Commission's intended use of Title II jurisdiction coupled with substantial forbearance is inappropriate in the context of broadband Internet service. Rather, the proper course is to exercise its limited ancillary jurisdiction under Title I. This would include the narrow, but important authority to insure that Internet "gatekeepers" do not block consumer web communications because of objections over the religious content of those communications. If the Commission desires more jurisdictional authority over the Internet than this, then it must seek it expressly from Congress.

Dated this 15th day of July, 2010.

Respectfully submitted,



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